

NO. 47158-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SPOKANE COUNTY; STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellants,

v.

SIERRA CLUB, and CENTER FOR ENVIRONMENTAL
LAW & POLICY,

Respondents.

**APPELLANT STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY'S
OPENING BRIEF**

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I. INTRODUCTION

In 2011, Spokane County (“County”) completed construction of a state of the art wastewater treatment facility that provides advanced treatment of domestic wastewater. The State of Washington, Department of Ecology (“Ecology”), did not have any facility-specific data regarding the quality of the effluent from the County’s new facility at the time the County was required to apply for a discharge permit to authorize the discharge from its new facility. Consequently, Ecology did not know whether the discharge from the County’s facility would cause or contribute to a violation of water quality standards, and did not know if water quality-based effluent limits would be necessary. In accordance with published guidance from the Environmental Protection Agency (“EPA”), Ecology issued a discharge permit that required the County to collect the facility-specific data that Ecology needs to determine whether the County’s discharge will cause or contribute to a violation of water quality standards in the Spokane River. If the data demonstrates that the discharge will cause or contribute to a violation of water quality standards, Ecology can modify the County’s permit to include any necessary water quality based effluent limits.

The Sierra Club and the Center for Environmental Law and Policy (collectively “Sierra Club”) appealed the County’s discharge permit to the

Pollution Control Hearings Board (“Board”). The Board concluded that Ecology “should have” determined whether the County’s facility would cause or contribute to a violation of water quality standards for polychlorinated biphenyls (“PCBs”), despite the lack of facility-specific data, and further concluded that the discharge from the County’s state of the art facility has a reasonable potential to cause or contribute to a violation of water quality standards for PCBs. The Board remanded the County’s permit to Ecology with directions to develop a water quality based effluent limit for PCBs.

In this appeal, Ecology challenges the Board’s conclusion that Ecology should have performed a reasonable potential analysis without facility specific data, the Board’s conclusion that the discharge from the County’s facility has a reasonable potential to cause or contribute to a violation of water quality standards, the Board’s conclusion that Ecology must add requirements to one of the conditions in the County’s permit, and the Board’s Order remanding the County’s permit to Ecology. Ecology also challenges the Thurston County Superior Court’s January 9, 2015 Order on Petition for Judicial Review, which affirmed the Board’s conclusions and remand order.

II. ASSIGNMENTS OF ERROR

Ecology assigns error to Conclusions of Law 10–16 and the resulting remand order from the Board’s July 19, 2013 Findings of Fact (“FF”), Conclusions of Law (“CL”), and Order in *Sierra Club v. Dep’t of Ecology*, Pollution Control Hearings Board No. 11-184 (“Board Decision”). Ecology also assigns error to the Superior Court’s January 9, 2015 Order on Petition for Judicial Review, which affirmed the Board’s conclusions and remand order.

III. ISSUES PRESENTED

1. Did the Board err when it concluded that Ecology “should have” conducted a reasonable potential analysis for the County’s new facility without effluent data from the facility, where published guidance from EPA gives Ecology the discretion to defer the reasonable potential analysis pending the collection of facility-specific effluent data?
2. Did the Board err in concluding that the discharge from the County’s state of the art treatment facility has a reasonable potential to cause or contribute to a violation of water quality standards?
3. Did the Board err in remanding the County’s permit to Ecology with directions to add requirements to one of the conditions in the permit based on the Board’s conclusion that the discharge from the

County's facility has a reasonable potential to cause or contribute to a violation of water quality standards?

4. Did the Superior Court err in affirming the Board's Decision?

IV. STATEMENT OF THE CASE

In 2011, Spokane County completed construction of a new wastewater treatment facility that uses membrane filtration to provide advanced wastewater treatment. Administrative Record ("AR") at 2227–28 (FF 14, 15). The County's treatment facility provides "the most advanced treatment of effluent available and deploys the best currently available treatment technology to reduce the discharge of PCBs to the Spokane River at potentially undetectable levels." AR at 2228 (FF 16). Prior to construction of its new facility, Spokane County sent its wastewater to the City of Spokane for treatment. AR at 2225 (FF 10). The County's new facility removes approximately 99% of the PCBs that enter the facility. Testimony of Bruce Rawls, Report of Proceedings ("RP") (Mar. 27, 2013) at 463:18–22.¹ By contrast, the City of Spokane's facility only removes about 90% of the PCBs that enter the facility. *Id.* The Sierra Club's expert witness agreed that the removal of PCBs by the County's facility

¹ The Report of Proceedings is the transcript of the proceedings before the Board. Citations to the Report of Proceedings will include the page number followed by the particular line or lines being cited.

was “remarkable” and that the County’s facility “far exceeds” the PCB removal at the City’s facility. Testimony of Peter deFur, RP (Mar. 26, 2013) at 277:2–14.

In order to operate its facility, Spokane County needed to obtain a National Pollutant Discharge Elimination System (“NPDES”) permit under the federal Clean Water Act. Accordingly, Spokane County applied to Ecology for a NPDES permit in September 2010. AR at 2229 (FF 18).² The discharge of PCBs into the Spokane River was one of the issues Ecology had to address as it prepared the County’s permit. *Id.* FF 19. Portions of the Spokane River are impaired by PCBs and the Department of Health has issued fish advisories for some segments of the river that recommend eating very little, and in some instances none, of the fish caught in several segments of the Spokane River. AR at 2221, 2223 (FF 2, 5).

Regulations adopted by EPA require that a NPDES permit include effluent limitations necessary to meet water quality standards if the discharge causes, has the reasonable potential to cause, or contributes to a violation of water quality standards. 40 C.F.R. § 122.44(d)(1)(iii). EPA has published guidance for performing this reasonable potential analysis.

² EPA has delegated the NPDES program to the state of Washington, and the Legislature has designated Ecology as the state water pollution control agency under the Clean Water Act. RCW 90.48.260.

Technical Support Document for Water Quality-Based Toxics Control, AR at 2587 (Hearing Ex. A-20). Since the County did not complete construction of its facility until 2011, Ecology did not have effluent data for the facility at the time the County applied for a NPDES permit in September 2010. Testimony of Richard Koch, RP (Mar. 25, 2013) at 119:22–120:2. EPA’s Technical Support Document includes guidance for conducting a reasonable potential analysis without facility-specific effluent monitoring data; but the guidance recognizes that the regulatory authority may benefit from collecting effluent monitoring data prior to establishing an effluent limit, and allows the regulatory authority to require effluent testing as a permit condition where the available effluent information does not allow the regulatory authority to determine whether the discharge has a reasonable potential to cause or contribute to a violation of water quality standards:

[T]he regulatory authority, if it chooses to impose an effluent limit after conducting an effluent assessment without facility-specific monitoring data, will need to provide adequate justification for the limit in its permit development rationale or in its permit fact sheet. A clear and logical rationale for the need for the limit covering all of the regulatory points will be necessary to defend the limit should it be challenged. In justification of a limit, **EPA recommends that the more information the authority can acquire to support the limit, the better a position the authority will be in to defend the limit if necessary.** In such a case, the regulatory authority may

well benefit from the collection of effluent monitoring data prior to establishing the limit.

If the regulatory authority, after evaluating all available information on the effluent, in the absence of effluent monitoring data, is not able to decide whether the discharge causes, has the reasonable potential to cause, or contributes to, an excursion above a numeric or narrative criterion for whole effluent toxicity or for individual toxicants, the authority should require whole effluent toxicity or chemical-specific testing to gather further evidence. In such a case, the regulatory authority can require the monitoring prior to permit issuance, if sufficient time exists, or it may require the testing as a condition of the issued/reissued permit.

AR at 2657 (Hearing Ex. A-20) (emphasis in original).

Pursuant to this guidance, Ecology exercised its permitting discretion and did not conduct a reasonable potential analysis for PCBs because Ecology did not have facility-specific PCB data from either the County's facility or from any similar advanced treatment facility. AR at 2230–31, 2234–35 (FF 20, 21, 25). Consistent with EPA'S guidance, Ecology required Spokane County to monitor both its influent and effluent for PCBs, and Ecology will be able to use this data to perform a reasonable potential analysis for the next permit cycle. AR at 2234–35 (FF 25); Spokane County's NPDES Permit, AR at 3645–46 (Hearing Ex. ECY-1).³ The PCB monitoring data the County has collected since issuance of its permit demonstrates a PCB removal rate that the Sierra

³ The County's current permit expires on November 31, 2016. AR at 3635 (Hearing Ex. ECY-1).

Club's expert characterized as "remarkable" and something that technical committees that have looked at PCB removal would have considered "not possible." RP (Mar. 26, 2013) at 277:4–7. The PCBs in the County's effluent are so low that an experienced chemist "can't tell the difference between effluent and ultra purified laboratory water." Testimony of Khalil Abusaba, RP (Mar. 27, 2013) at 576:17–22.

The Sierra Club appealed the County's NPDES permit to the Board. The Sierra Club's main argument was that 40 C.F.R. § 122.4(i) prohibited Ecology from issuing a NPDES permit to the County until after Ecology completed a total maximum daily load analysis for the Spokane River.⁴ AR at 2236–37 (CL 4). The Board concluded that 40 C.F.R. § 122.4(i) did not prohibit Ecology from issuing a NPDES permit to the County. AR at 2239 (CL 7). Sierra Club did not appeal this conclusion.

The Board did not conclude that it was arbitrary, capricious, or otherwise unlawful for Ecology to follow EPA's guidance and defer a reasonable potential analysis for PCBs while the County collected the monitoring data Ecology needs for the analysis. Instead, the Board concluded that Ecology "should have" conducted a reasonable potential

⁴ A total maximum daily load analysis establishes the maximum amount of a pollutant a waterbody can receive from all sources on a daily basis without violating the water quality standard for that pollutant. *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002).

analysis for PCBs despite the lack of facility-specific PCB effluent data for the County's facility or any similar advanced treatment facility. AR at 2240–41 (CL 10). The Board also concluded “that the evidence presented supports the conclusion that there is a reasonable potential for the discharge from the Facility to cause or contribute to a violation of water quality standards.” *Id.* Based on this conclusion, the Board concluded an effluent limit for PCBs was required pursuant to 40 C.F.R. § 122.44(d)(1)(iii), which requires a water quality based effluent limit for a pollutant if the discharge of the pollutant has a reasonable potential to cause or contribute to a violation of a water quality standard for that pollutant. AR at 2241 (CL 10). The Board agreed that the available data “was not adequate for preparation of a numeric effluent limit for PCBs.” *Id.* (CL 11). Accordingly, the Board concluded Ecology was required to include either best management practices or a narrative effluent limit in the permit to control the discharge of PCBs from the County's facility. *Id.* (CL 12).

Condition S12 of the County's permit requires the County to submit an Annual Toxics Management Report to Ecology for review and evaluation. AR at 3680 (Hearing Ex. ECY-1). The County's Toxics Management Plan is required to address source control and elimination of PCBs from a variety of sources. *Id.* The Board concluded that Ecology

must add deadlines and mandatory requirements for identification and implementation of measures to reduce PCBs in the wastewater that enters the County's facility, and must identify the expected reductions in toxics loading and the schedule for initiating such reductions. AR at 2243–44 (CL 14, 15).

Ecology and Spokane County filed a Petition for Judicial Review of Agency Action in Thurston County Superior Court, challenging the Board's Conclusions of Law 10–16 and the Board's Order at paragraph 1(a)–(c). Clerk's Papers ("CP") at 4–45. On January 9, 2015, the Honorable Erik D. Price issued an Order on Petition for Judicial Review affirming the Board's Decision. Clerk's Papers ("CP") at 46–47. Ecology timely appealed to this Court, and challenges the Board's Conclusions of Law 10–16 and the Board's Order at paragraph 1(a)–(c); as well as the Superior Court's Order affirming the Board's Decision.

V. ARGUMENT

A. Standard Of Review

This appeal involves judicial review of an agency decision under the Washington Administrative Procedures Act ("APA"). The Court's review of the facts is confined to the record before the Board. RCW 34.05.558. This Court sits in the same position as the superior court and applies the standards of the APA directly to the Board's record. *Dep't of*

Ecology v. Douma, 147 Wn. App. 143, 151, 193 P.2d 1102 (2008). The burden of demonstrating the invalidity of the Board's Decision is on Ecology, the party asserting invalidity. RCW 34.05.570(1)(a).

Ecology's appeal challenges seven of the Board's conclusions of law and the resulting order. The Court reviews the Board's conclusions of law de novo, and is not bound by the Board's interpretation of a statute. *City of Redmond v. Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). The Court may grant relief from the Board's decision if the Board has erroneously interpreted or applied the law. RCW 34.05.570(3)(d).

Ecology's expertise in administering water quality laws and on technical judgments, especially those involving complex scientific issues, is entitled to deference. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593–94, 90 P.3d 659 (2004). In addition, this Court has previously held that Ecology should be given deference over the Board regarding the interpretation of statutes and regulations dealing with water resources because the Legislature designated Ecology to regulate Washington's water code. *Cnty. Assoc. for Restoration of the Env't v. Dep't of Ecology*, 149 Wn. App. 30, 840 n.10, 205 P.3d 950 (2009) (quoting *Public Utility Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 157, 151 P.3d 1067 (2007)). See also

Port of Seattle, 151 Wn.2d. at 593 (Ecology’s interpretation of relevant statutes and regulations entitled to great weight because Legislature designated Ecology to regulate State’s water resources).

B. The Board Erred In Concluding That Ecology Should Have Conducted A Reasonable Potential Analysis For PCBs Despite The Absence Of Any Facility-Specific PCB Data.

The Board relied on EPA’s Technical Support Document to conclude that Ecology “should have” conducted a reasonable potential analysis for PCBs despite the lack of facility-specific PCB data. AR at 2240 (CL 9, 10). However, under EPA’s Technical Support Document, Ecology had the discretion to either attempt to conduct a reasonable potential analysis without facility-specific PCB data, or to defer the reasonable potential analysis and require the County to collect PCB data that Ecology could use to conduct the reasonable potential analysis. AR 2656–57 (Hearing Ex. A-20). Ecology chose the latter approach. EPA also elected to defer a reasonable potential analysis for PCBs for the NPDES permits EPA issues to Idaho dischargers that discharge into the Spokane River in Idaho.⁵ AR at 3753 (Hearing Ex. ECY-6) (explaining that the lack of data prevents EPA from determining whether the Idaho dischargers have a reasonable potential to cause or contribute to a violation of water quality standards for PCBs).

⁵ EPA is the permitting authority in Idaho because EPA has not delegated the NPDES program to the state of Idaho.

While the Board disagreed with Ecology's approach, the Board cannot add conditions to a permit, or order Ecology to add conditions to a permit, simply because the Board feels additional conditions would make the permit more protective of water quality. *See, Port of Seattle*, 151 Wn.2d at 592 (Board may not add conditions to Clean Water Act certification issued by Ecology "simply because it feels such conditions would make the certification more protective of water quality."). In order to add requirements to a permit issued by Ecology, the Board must first find that Ecology's permit is invalid in a particular respect. *Id.* at 592–93. *See also*, WAC 371-08-540(2) (Board shall order Ecology to reissue permit if Board concludes permit is invalid). Ecology's exercise of discretion is lawful so long as Ecology does not exercise its discretion in a manner that is arbitrary, capricious, fraudulent, or without a factual basis. *Thomas v. Lehman*, 138 Wn. App. 618, 626, 158 P. 3d 86 (2007). At the hearing before the Board, Sierra Club had the burden of proving that Ecology exercised its discretion in a manner that was arbitrary, capricious, fraudulent, or without a factual basis. AR at 2235 (CL 1). The Board did not find or conclude that Ecology's decision to defer a reasonable potential analysis for PCBs while the County collects facility-specific PCB data was arbitrary, capricious, fraudulent, or without a factual basis. To the contrary, the Board found that Ecology had exercised its permitting

discretion “[p]ursuant to [EPA’s] guidance.” AR at 2234 (FF 25). The Board erroneously interpreted and applied the law when it concluded that Ecology “should have” conducted a reasonable potential analysis despite the lack of facility-specific PCB data without first finding that Ecology exercised its permitting discretion in a manner that was arbitrary, capricious, fraudulent, or without a factual basis. Relief is therefore appropriate pursuant to RCW 34.05.570(3)(d), and the Court should reverse the Board’s remand of the County’s permit to Ecology.

C. The Board Erred In Concluding That There Is A Reasonable Potential For The County’s Discharge To Cause Or Contribute To A Violation Of PCB Water Quality Standards

If the Court concludes that the Board properly concluded that Ecology “should have” performed a reasonable potential analysis without facility-specific PCB data, the Court should still reverse the Board’s remand of the County’s permit to Ecology because the Board erred in concluding that there is a reasonable potential for the County’s discharge to cause or contribute to a violation of PCB water quality standards.

A reasonable potential analysis evaluates whether a discharge has the reasonable potential to cause or contribute to a violation of water quality standards. 40 C.F.R. § 122.44(d)(1)(iii) (requiring effluent limit for a pollutant if the permitting authority determines “that a *discharge* causes, has the reasonable potential to cause, or contributes to” an

exceedance of a water quality standard (emphasis added)). While the condition of the waterbody that a facility discharges into is an important factor to consider, a reasonable potential analysis must evaluate the impact of the discharge on the waterbody.

In Conclusion of Law 9, the Board identified five factors from EPA's guidance that were available to Ecology at the time Ecology wrote the County's permit: (1) the type of treatment plant seeking a permit; (2) available dilution for the effluent; (3) existing data on toxic pollutants; (4) the state's list of waters not meeting water quality standards; and (5) fish advisories or bans. AR at 2240 (CL 9). Ecology does not disagree with the Board's conclusion that these factors were available. However, Ecology does disagree with the Board's conclusion, unsupported by any analysis, that these factors should have been used to conduct a reasonable potential analysis without facility-specific data, and that such an analysis would lead to a conclusion that there is a reasonable potential for the discharge from the County's facility to cause or contribute to a violation of PCB water quality standards. *Id.* CL 10. As discussed below, the Board erroneously focused on the condition of the Spokane River and failed to properly analyze the impact the County's discharge would have on the river. The Board's conclusion erroneously interpreted and applied the law, and should be reversed pursuant to RCW 34.05.570(3)(d).

1. The advanced treatment employed at the County's facility does not demonstrate a reasonable potential to cause or contribute to a violation of PCB water quality standards.

As the Board found, the County's treatment facility employs treatment technology that is "the most advanced treatment of effluent available and deploys the best currently available treatment technology to reduce the discharge of PCBs to the Spokane River at potentially undetectable levels." AR at 2228 (FF 16). The Board also found that "reducing the discharge of PCBs into the Spokane River requires the implementation of source control activities and use of advanced treatment technology." *Id.* The Board's findings of fact do not support the Board's conclusion that the "type of publicly owned treatment plant seeking a permit" supports a conclusion that the discharge from the County's advanced treatment facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards. AR at 2240–41 (CL 9, 10).

At the time of the hearing before the Board, the County had collected some of the PCB monitoring data required by its permit, and that data demonstrates PCB removal that the Sierra Club's expert witness characterized as "remarkable." ⁶ RP (Mar. 26, 2013) at 277:4. The Sierra

⁶ While the County collected this data after Ecology issued the County's permit, the Board's scope of review is de novo, WAC 371-08-485(1), and the Board may rely on

Club's expert went on to testify that technical committees that have been looking into PCB treatment would have said the results obtained by the County were "not possible." *Id.* at 277:4–7. Spokane County's expert testified that he couldn't tell the difference between the amount of PCBs in the County's treated effluent and the amount of PCBs present in ultra purified laboratory water. RP (Mar. 27, 2013) at 576:17–22. Consistent with the testimony of the Sierra Club's expert, the County's expert testified that he didn't think "anyone has ever seen a wastewater treatment plant performing like this one in terms of overall removal of PCBs." *Id.* at 584:13–15. The County's expert went on to suggest that the extremely low levels of PCBs in the County's effluent might actually "be diluting the concentration of PCBs in the Spokane River and bringing it down." *Id.* at 616:2–5.

The Board's findings of fact do not support the Board's conclusion that the County's use of the most advanced treatment technology available results in a discharge that has a reasonable potential to cause or contribute to a violation of PCB water quality standards.

information that was not available to Ecology at the time Ecology issued the County's permit. *Port of Seattle*, 151 Wn.2d at 597–98.

2. The fact that there is available dilution in the Spokane River for the County's discharge does not demonstrate a reasonable potential to cause or contribute to a violation of PCB water quality standards.

The Board did not make any findings of fact regarding the available dilution in the Spokane River for the County's discharge. Consequently, the Board's findings of fact do not support the Board's conclusion that the "available dilution for the effluent" supports a conclusion that the discharge from the County's state of the art treatment facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards. Rather than making any findings of fact regarding the available dilution, the Board identified the Fact Sheet Ecology prepared for the County's permit and the discussion within the Fact Sheet of the "dilution provided by the Spokane River." AR at 2240 (CL 9).

The Fact Sheet includes a discussion of available dilution in the Spokane River, and demonstrates that there is some dilution available for the County's discharge. AR at 3725–32 (Hearing Ex. ECY-2). Given the fact that the County's facility removes so much PCBs that the County's treated effluent cannot be distinguished from ultra purified laboratory water, the County doesn't need any dilution for its nearly undetectable PCB discharge. The fact that the Spokane River has some dilution available for the County's extremely low levels of PCB discharge does not

demonstrate that the discharge has the reasonable potential to cause or contribute to a violation of the PCB water quality standards.

The Board's findings of fact do not support the Board's conclusion that the available dilution in the Spokane River for the County's discharge creates a reasonable potential to cause or contribute to a violation of PCB water quality standards.

3. The Board's conclusion that existing PCB data demonstrates a reasonable potential to violate PCB water quality standards is inconsistent with the Board's conclusion that the existing PCB data was of limited usefulness.

As the Board properly concluded, Ecology's Source Assessment document has some PCB data that was available at the time Ecology prepared the County's permit. AR at 2240 (CL 9). However, Ecology's permit writer, Richard Koch, testified that he did not use the PCB data in the Source Assessment document because "it had been collected several years earlier and he would want more recent data to conduct a reasonable potential analysis." AR at 2231 (FF 21). The Board agreed that the data in the Source Assessment was dated and of limited usefulness:

The Board recognizes that the PCB monitoring data included in the Source Assessment was collected a number of years ago and that several PCB clean up actions have occurred in the Spokane River in the interim. As Mr. Koch testified, those factors limited the usefulness of that data in developing a numeric limit.

AR at 2241 (CL 11).

As discussed above, Mr. Koch also testified that he didn't find the dated data in the Source Assessment useful for a reasonable potential analysis. AR at 2230–31 (FF 21).

In a puzzling conclusion, the Board held:

While the Board finds that there was sufficient data available for Ecology to conduct a reasonable potential analysis, we concur with Mr. Koch's determination that the data was not adequate for preparation of a numeric effluent limit for PCBs. The Board defers to the technical expertise of Ecology on this matter and accepts his conclusion that calculation of a numeric effluent limit for PCBs was not feasible.

AR at 2241 (CL 11).

This conclusion is internally inconsistent. If the dated PCB data was not useful for developing a numeric effluent limit, how could the same data support a conclusion that the discharge from the County's advanced treatment facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards? The Board's decision fails to explain this inconsistency. Moreover, if the Board deferred to Ecology's technical expertise in deciding that the existing PCB data was not useful for calculating a numeric effluent limit, why didn't the Board also defer to Ecology's technical expertise in deciding that the existing PCB data was not useful for conducting a reasonable potential analysis? Again, the Board's Decision fails to explain this inconsistency,

which is particularly troublesome given the Board's recognition that it gives "deference to Ecology's expertise in administering water quality laws and on technical judgments, especially where they include complex scientific issues." AR at 2235 (CL 1) (citing *Port of Seattle*, 151 Wn.2d at 593–94).

The PCB data in the Source Assessment is not an accurate reflection of the amount of PCBs in the Spokane River because, as the Board found, a number of PCB clean up actions have occurred in the Spokane River since the Source Assessment data was collected. *See* AR at 2224 (FF 7) (noting that Source Assessment included PCB monitoring data Ecology collected from September 2003 through May 2004) and AR at 2225 (FF 9) (noting PCB clean up actions in 2006 and 2007, and the City of Spokane's removal of PCB contaminated sediments pursuant to a 2011 settlement agreement).

The Board's findings of fact do not support the Board's conclusion that the "existing data on toxic pollutants" demonstrates that the discharge from the County's advanced treatment facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards. AR at 2240 (CL 9). Ecology properly exercised its technical expertise in concluding that the PCB data in the Source Assessment was too dated to be used for a reasonable potential analysis, and the Board erroneously

interpreted and applied the law when it failed to give deference to Ecology's technical expertise regarding the usefulness of the data.

- 4. The fact that segments of the Spokane River are on Washington's list of waters not meeting water quality standards for PCBs does not demonstrate a reasonable potential for the County's discharge to cause or contribute to a violation of PCB water quality standards.**

Under section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), Ecology is required to prepare a list every two years of waterbodies that do not meet water quality standards.⁷ Segments of the Spokane River are included on Washington's list of waters not meeting water quality standards for PCBs, but the segment of the River that Spokane County's facility discharges into is not identified as water-quality impaired by PCBs. AR at 2221, 2227 (FF 2, 14). Nonetheless, there is no dispute that the environmental health of the Spokane River is not good and significant reductions in PCB loadings to the Spokane River are necessary. However, the fact that sections of the Spokane River are impaired by PCBs does not demonstrate that the discharge from the County's advanced treatment facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards. In fact, the construction and operation of the County's state of the art facility is an important and necessary step

⁷ This list of water quality impaired waters is referred to as the "303(d) list" in the Board's Decision.

towards bringing the Spokane River into compliance with PCB water quality standards. *See* AR at 2228 (FF 16) (reducing the discharge of PCBs into the Spokane River will require the use of advanced treatment technology as well as PCB source control).

Prior to construction and operation of its new facility, Spokane County's wastewater received treatment at the City of Spokane's treatment facility. AR at 2225 (FF 10). Even the Sierra Club's expert agreed that PCB removal at the County's facility "far exceeds" the PCB removal the County's wastewater received at the City's facility. RP (Mar. 26, 2013) at 277:8–14. The Sierra Club's expert also agreed that the superior treatment provided by the County's facility is "impressive" and "a very good thing." *Id.* at 305:23–306:4. While the monitoring data the County has collected under its permit is limited, that data indicates that the level of PCBs in the County's treated effluent cannot be distinguished from the levels of PCBs in ultra pure laboratory water. RP (Mar. 27, 2013) 576:17–22. In fact, the levels of PCBs in the County's treated effluent are so low that the County's discharge may actually be diluting the PCB concentrations in the Spokane River and bringing those concentrations down. *Id.* at 615:23–616:5.

The fact that segments of the Spokane River are impaired by PCBs does not demonstrate that the discharge from the County's advanced

treatment facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards. As the Board found, advanced treatment technology, like the advanced treatment technology used by the County, is necessary to reduce the discharge of PCBs into the Spokane River. AR at 2228 (FF 16). The Board's findings of fact do not support the Board's conclusion that "the state's list of waters not meeting water quality standards" demonstrates that the discharge from the County's advanced treatment facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards. AR at 2240 (CL 9).

5. The fact that there are fish advisories or bans on the Spokane River does not demonstrate a reasonable potential for the County's discharge to cause or contribute to a violation of PCB water quality standards.

One consequence of the poor environmental health of the Spokane River is that the Department of Health has issued a number of fish advisories for the River, suggesting that people limit their consumption of some fish caught in some segments of the River and avoid eating fish caught in some segments of the River. AR at 2223 (FF 5). In order to return the Spokane River to good environmental health, the other facilities that discharge wastewater to the River will need to follow Spokane County's lead and upgrade their facilities to also provide advanced

treatment of their wastewater. AR at 2228 (FF 16) (reducing the discharge of PCBs into the Spokane River will require the use of advanced treatment technology). Improving PCB removal, as the County has done with its new facility, is part of the solution to the problems that plague the Spokane River. There is no dispute that the superior treatment provided by the County's facility is a "very good thing" for the Spokane River. RP (Mar. 26, 2013) at 305:23–306:4. The fact that there are fish advisories on the Spokane River does not demonstrate that the discharge from the County's advanced treatment facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards. To the contrary, the County's decision to use the most advanced treatment technology available is a necessary step towards bringing the Spokane River back into compliance with PCB water quality standards and removing the fish advisories recommended by the Department of Health.

Ecology properly exercised its expertise in administering state and federal water pollution laws by following EPA's guidance and requiring the County to collect effluent and influent monitoring data that Ecology can use to conduct a reasonable potential analysis. AR at 2234–35 (FF 25). The Board erroneously interpreted and applied the law when it failed to give Ecology the deference the Board recognized Ecology is

entitled to under *Port of Seattle*, 151 Wn.2d at 593–94. AR at 2235 (CL 1). Relief is therefore appropriate under RCW 34.05.570(3)(d).

D. The Board Erred In Concluding That Ecology Must Modify Condition S12 Of The County’s Permit

If a discharge has a reasonable potential to cause or contribute to a violation of a water quality standard, the permitting authority must include an effluent limit in the permit to achieve compliance with the water quality standard. 40 C.F.R. § 122.44(d)(1); 33 U.S.C. § 1311(b)(1)(C). This limit is referred to as a water quality based effluent limit. After the Board erroneously concluded that the discharge from the County’s facility has the reasonable potential to cause or contribute to a violation of PCB water quality standards, the Board proceeded to evaluate Condition S12 of the County’s permit to determine whether the Condition was a narrative water quality based effluent limit. AR at 2240–45 (CL 10, 12–16). The Board concluded that as written, Condition S12 is not a narrative water quality based effluent limit and remanded the County’s permit to Ecology with directions to modify Condition S12 by adding requirements the Board deemed necessary to make the Condition a narrative water quality based effluent limit. AR at 2246–47 (Order ¶ 1(a)–(c)).

The only basis for the Board’s evaluation and ultimate remand of Condition S12 was the Board’s erroneous conclusion that the discharge

from the County's facility has the reasonable potential to cause or contribute to a violation of PCB water quality standards. *See* AR at 2241 (CL 10) ("once it is determined that a reasonable potential exists, the next step is the determination of an effluent limit for PCBs. 40 C.F.R. § 122.44(d)(1)(iii)."). As discussed above, the Board's conclusion that the discharge from the County's facility has a reasonable potential to cause or contribute to a violation of PCB water quality standards is based on an erroneous interpretation and application of the law. Accordingly, a water quality based effluent limit for PCBs is not required and Condition S12 does not need to be modified to convert it into a narrative water quality based effluent limit. Relief is appropriate under RCW 34.05.570(3)(d) because the Board has erroneously interpreted or applied the law, and Ecology respectfully requests that the Court reverse the Board's Conclusions of Law 10–16 and its Order, paragraph 1(a)–(c).

VI. CONCLUSION

For the reasons discussed above, the State of Washington, Department of Ecology respectfully requests that the Court reverse the

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Board's Conclusions of Law 10–16, and its Order to revise Condition S12 of Spokane County's permit. Order ¶ 1(a)–(c).

RESPECTFULLY SUBMITTED this 28th day of May, 2015.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in dark ink, appearing to read 'Ronald L. Lavigne', is written over a faint, circular official stamp.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 28, 2015, I caused to be served Appellant Department of Ecology's Opening Brief in the above-captioned matter upon the parties herein as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of May, 2015, in Olympia, Washington.


DONNA FREDRICKS, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

May 28, 2015 - 2:39 PM

Transmittal Letter

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Comments:

State of Washington, Department of Ecology's Opening Brief

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